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IN THE

SUPREME COURT OF THE UNITED STATES

No. 73-1216

RUBY DAVIDSON WALDEN
and
WILLIAM LUTHER WALDEN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A
WRIT OF CERTIORARI

Frank B. Tavenner
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Washington, D.C.

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REFERENCE TO REPORTS OF OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The judgment of the United States District Court for the Eastern District of Virginia, Alexandria Division, is not reported, but is appended herewith. The opinion of the United States Court of Appeals for the Fourth Circuit is not yet reported but is appended herewith.

GROUNDS OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit handed down its decision on January 10, 1974. Petition for a writ of certionari was filed on February 8, 1974. Jurisdiction is conferred on this Court by reason of 28 USC S1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether it was error for the Circuit Court to refuse to suppress evidence that it found to have been gathered illegally?

2. Whether it was error for the Circuit Court to refuse to decide a properly preserved constitutional question when the resolution of all other issues did not result in a reversal of defendants' convictions.

3. Assuming arguendo this Court will in some way by-pass question number two, did the investigative procedures used by the government to procure evidence leading to defendants' convictions violate the Federal Constitutional guarantees against military intrusion into civilian governmental duties?

4. Whether such evidence obtained in violation of the Federal Constitution must be suppressed.

CONSTITUTIONAL PROVISION

United States Constitution, Article I, Section 8.

"The Congress shall have the power . . . to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions."

United States Constituion, Article II, Sectionl.

"The executive power shall be vested in a President of the United States of America."

United States Constitution, Article II, Section 2.

"The President shall be commander-in-chief of the army and navy of the United States."
United States Constitution, Article II, Section 3.

"[The President] shall take care that the laws be faithfully executed."
United States Constitution, Article IV, Section.

"The United States shall guarantee to every state in this Union a Republican form of government and shall protect each of them against invasion: and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."
United States Constitution, Article VI.

"This Constitution, and the laws of the United States which shall be in pursuance thereof: and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law

of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding."

United States Constitution, Amendment III.

"No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of way, but in a manner to be prescribed by law."

United States Constitution, Amendment V.

"No person shall be . . . deprived of live, liberty or property, without due process of law."

United States Constitution, Amendment IV.

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

United States Constitution, Amendment X.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are

reserved to the states respectively, or to the people."

United States Constitution, Amendment XIV.

". . . ; nor shall any State deprive any person of life, liberty or property, without due process of law."

S T A T U T E S

18 USC § 595 Interference by administrative employees of Federal, State, or Territorial Governments

> Whoever, being a person employed in any administrative position by the United States, or by any department or agency thereof, or by the District of Columbia or any agency or instrumentality thereof, or by any State, Territory, or Possession of the United States, or any political subdivision, municipality, or agency thereof, or agency of such political subdivision or municipality (including any corporation owned or controlled by any State, Territory, or Possession of the United States or by any such political subdivision, municipality, or agency), in connection with any activity which is financed in whole or in part by loans or grants made by the United States, or any department or agency thereof, uses his official authority for the purpose

of interfering with, or affecting, the nomination or the election of any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, or Delegate or Resident Commissioner from any Territory or Possession, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

This section shall not prohibit or make unlawful any act by any officer or employee of any educational or research institution, establishment, agency, or system which is supported in whole or in part by any state or political subdivision thereof, by the District of Columbia or by any Territory or Possession of the United States; or by any recognized religious, philanthropic or cultural organization.

18 USC § 1384 Prostitution near military and and naval establishments

Within such reasonable distance of any military or naval camp, station, fort post, yard, base, cantonment, training or mobilization place as the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or any two or all of them shall determine to be needful to the efficiency, health, and welfare of the Army, the Navy, or the Air Force, and shall designate and publish in general orders or bulletins, whoever engages in prostitution or aids or abets prostitution or procures or solicites for purposes of prostitution, or keeps or sets up a house of ill fame, brothel, or

bawdy house, or receives any person for purpose of lawdness, assignation, or prostitution into any vehicle, conveyance, place, structure, or building, or permits any person to remain for the purpose of lewdness, assignation, or prostitution in any vehicle, conveyance, place, structure, or building or leases, or rents or contracts to lease or rent any vehicle, conveyance, place, structure or building, or part thereof, knowing or with good reason to know that it is intended to be used for any of the purposes herein prohibited shall be fined not more than $1,000.00 or imprisoned not more than one year, or both.

The Secretaries of the Army, Navy and Air Force and the Federal Security Administrator shall take such steps as they deem necessary to suppress and prevent such violations thereof, and shall accept the cooperation of the authorities of States and their counties, districts, and other political subdivisions in carrying out the purpose of this section.

This section shall not be construed as conferring on the personnel of the Departments of the Army, Navy or Air Force or the Federal Security Agency any authority to make criminal investigations, searches, seizures, or arrests of civilians charged with violations of this section.

18 USC § 1385 Use of Army and Air Force as posse comitatus

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000.00 or imprisoned not more than two years, or both.

Secretary of the Navy Instruction 5400.12

provides that:

> . . . throughout the United States, it is a fundamental policy to use civilian, rather than military, officials and personnel to the maximum extent possible in preserving law and order. In the Federal government this policy is reflected by the Posse Comitatus Act (18 USC 1385) which prohibits the use of any part of the Army or Air Force to enforce local, state, or Federal laws except as Congress may authorize. Although not expressly applicable to the Navy and Marine Corps, that act is regarded as a statement of Federal policy which is closely followed by the Department of the Navy. SECNAVINST 5400.12, p. 2 (January 17, 1969).

STATEMENT OF THE CASE AND FACTS

Federal jurisdiction was invoked when the government initiated this action in the United States District Court for the Eastern District of Virginia against appellants, Ruby Davidson Walden and William Luther Walden. Ruby Davidson Walden was charged with, to-wit: Conspiracy to commit offense or to defraud the United States, Section 371, Title 18, USC; Selling Firearms to a person under twenty-one years of age, Section 922 (b) (1), Title 18, USC; and selling firearms to a person not a resident of the State where the licensee is doing business, Section 922(b) (3), Title 18, USC. William Luther Walden was charged with, to-wit: Conspiracy to commit offense or to defraud the United States, Section 371, Title 18, USC; and Selling Firearms to a person under twenty-one years of

age, Section 922 (b) (1), Title 18, USC. A search warrant was issued of January 10, 1972, and certain transaction records were seized at that time.

An indictment was returned during the February, 1972, term in four Counts, to-wit:

Count I - charged Ruby Davidson and William Luther Walden with conspiracy;

Count II - charged Ruby Davidson Walden with selling firearms to a person under twenty-one years of age;

Count III - charged William Luther Walden with selling firearms to a person under twenty-one years of age; and

Count IV - charged Ruby Davidson Walden with selling firearms to a person who did not reside in Virginia.

On March 2, 1973, a Motion to Dismiss Indictment or to Quash Warrant and Strike Testimony was filed and later Memoranda

submitted. Upon timely answer, the Motion was denied.

At the end of all of the evidence at trial, Hon. Judge Bryan, Jr., dismissed Count I of the indictment stating that there was not enough evidence to submit the conspiracy Count to the Jury.

The Jury then rendered a verdict finding Ruby Davidson Walden not guilty of Count II and guilty of Count IV and judgment was so entered. A guilty verdict and judgment were entered against William Luther Walden on Count III.

Some time prior to the Waldens' arrests, Special Investigator Carl W. Windsor, Jr., engaged the assistance of members of the United States Marines in his investigation of suspected violations of Federal Firearms Law. Special Investigator Windsor was successful in recruiting then active duty Marines, David L. Durham, Vernon Eugene Albery, and

Arthur B. Coleman, III, allof whom subsequently participated in said investigations. At least some of this recruiting took place under the auspices of and with the assistance from a Marine Staff Sergeant Methany.

The net result of this Marine Corps -- Treasury Department cooperation was to send forward, as military agents, corporals, Durham, Albery and Coleman.

Over counsel's preliminary objection, Mr. Durham was permitted to testify that he and a fellow Marine, Corporal Albery entered defendants' store to buy a gun. Mr. Durham, at that time, was not twenty-one years of age. Mr. Durham alleged that he paid Mrs. Walden for the gun, received it from her, but that Corporal Albery signed the necessary forms required by Federal Law. Additionally, Mr. Durham testified that after he was twenty-one years of age he went

into defendants' store with another fellow Marine, Corporal Coleman, then twenty years of age. Mr. Durham alleged that Corporal Coleman paid for a weapon and then, he, Mr. Durham, signed the necessary forms required by Federal Law.

Mr. Durham also testified that after he had obtained the legal age of twenty-one years he entered the defendants' store with Special Investigator Clowser, a resident of Maryland, and purchased a firearm. Mr. Durham signed the necessary forms for the purchase of a firearm and was handed a receipt by Ruby Walden.

After Agent Clowser received the weapon a receipt was executed between Mr. Durham and Agent Clowser stating, "Sold from David Durham to Mr. Clowser".

Marine Corporal Vernon Eugene Albery, Marine Corporal Arthur B. Coleman, III, and Special Investigator William Lester Clowser testified to essentially the

same facts as Mr. Durham.

Special Investigator Carl W. Windsor testified that he engaged the Marine Corps in the investigation of the defendants.

Subsequent to the testimony of the witnesses for the government, counsel moved for acquittal on the basis that the prosecution had not shown at any time that the defendants made a sale to a person under twenty-one years of age and that the involvement of the United States Marine Corps was a direct violation of 18 USC S1385. However, the Motion was denied.

A R G U M E N T S

I. The Circuit Court Erred By Not Suppressing Evidence It Found To Have Been Gathered Illegally.

The Circuit Court unequivocally found that violations of military law (Navy Instruction 5400.12) led to the Walden convictions. The evidence was, according to the Circuit Court, obtained illegally.

The Circuit Court refused, however, to suppress the evidence. The effect of this decision leaves two individuals standing convicted before the federal bar on the basis of evidence that could not have been obtained but for illegal governmental investigative procedures. Is this the level of judicial dignity to which the Supreme Court will permit federal courts to fall? McNabb v. Mallory, 318 US 608 (1943) clearly says no.

II. The Circuit Court Erred When It Refused to Decide a Properly Preserved Constitutional Question When the Resolution of all Other Issues did not result in a Reversal of Defendants' Convictions.

The Circuit Court states in its opinion:

> In this case, because the Secretary of the Navy Instruction, viewed alone and in the light of the Posse Comitatus Act, affords a non-constitutional standard for judging the legality of the Military action, we do not find it necessary to interpret relative unexplored sections of the Constitution in order to determine whether there might be constitutional objection to the use of the military to enforce civilian laws.

Well, this would have been more than satisfactory to petitioners if the Court had suppressed the evidence on these non-constitutional grounds. The fact is that the Court did not do so, and could not have adjudicated all of petitioners' rights without passing on the constitutional issue raised throughout this case.

Petitioners have made a bona fide claim that their constitutional right to be free from military instrusion into civil

McNabb, of course, was an exercise of the Court's supervisory power over the federal judicial system. McNabb set down rules peculiarly applicable to the present case. In both cases violations of federal law (in McNabb - statutory law, here - regulatory law) by the government during the course of a criminal investigation resulted in gathering of prejudicial evidence. Two passages from McNabb make clear why suppression is required:

> "Plainly a conviction resting on evidence secured through such a flagrant disregard of the procedures which Congress has commanded cannot be allowed to stand without making the Courts themselves accomplices in wilful disobedience of the law. McNabb v. United States 318 US at 345 (1943).

and

> "Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the Federal Courts would stultify the policy which Congress has enacted into law. McNabb v. United States 318 US 332 at 345 (1943).

matters was violated. It seems very clear that the Circuit Court could abstain from answering petitioners' constitutional claim only by suppressing the evidence on some non-constitutional ground.

III. The investigative procedures used by the Government were in violation of the Federal Constitution.

A careful study of the legislative history of the Posse Comitatus Act 18USC reveals the sponsors and supporters of the statute did not intend to proscribe the acts enumerated in the statute rather they intended to provide a penalty for acts which had been illegal every since the ratification of the United States Constitution. For example, Seantor Kernan from New York stated:

> I suppose no one claims that you can use the Army as a pssse comitatus unless that use is authorized by the Constitution, which it clearly is not, or by Act of Congress. The Constitituion authorizes its use to repel the invasions of a State and to Suppress domestic insurrection, or the call of the Legislature if in session, or, if it be notin session, on call of the governor. 7 Cong. Rec. 4240.

Or as Senator Merrimon of North Carolina explained:

> The Army, under the Constitution, is not to be used for the purpose of executing the law in the ordinary sense of executing the law. It can only be called into active service for the purpose of suppressing insurrection, where there is organized resistance against the Government in the execution of the law. 7 Cong. Rec. 4243.

Or as Senator Hill from Georgia so vehemently argued,

> Whenever the idea obtains that you need a military power to govern the great body of people of this country you have given up the fundamental theory of your system of government; it is gone. I care not by what agency it is brought about the fact will remain that whenever you need the military arm habitually, or in better language, whenever your conclude that it is right to use the Army to execute civil process, to discharge those duties that belong to civil officers and to citizens, then you have given up the character of your government; it is no longer a government for liberty; it is no longer government founded in the consent of the people; it has become a government of force. The Army is a government of force it has no civil functions in the proper sense of theterm.
> 7 Cong. Rec. 4247.

It is clear that the solicitation of aid from the Marine Corps was an unconstitutional and therefore impermissible usurpation of authority by the civilian officials. No where in the Constitution is such activity authorized.

Even in 18 USC § 1384 (Appendix p.2) where Congress permitted the military to take steps to prevent prostitution within a reasonable distance of military installations, such steps could only be taken by designated civilian authorities within the military and while cooperation with State and local authorities was permitted, the military was prohibited from makein" . . . criminal investigations, searches, seizures, or arrests of civilians charged with violations of this section." It should be noted that this is the only section in the United States Code, where Congress has authorized the Military to enter into an area limited to civilian authorities without petition of the

legislature or the governor to the President of the United States and with his authorization. It should further be noted that the scope of such authorization is limited in physical area; subject matter and power.

In a recent decision concerning military surveillance of civilians, Laird v. Tatum, 40 LW. 4850 (1972), the majority of the Court found that while there was no justiciable controversy in that respondents failed to show objective harm or threat of specific future harm, cases which can show any recognizable injury would not go unnoticed and cases which involved unlawful activity of the military would not go unremedied.

Mr. Chief Justice Burger discusses the traditions of civilianism and what protections the Court is prepared to provide in the event of a real or truly threatened military intrusion.

"The concerns of the Executive and Legislative Branches in response to disclosure of the Army surveillance activities - and indeed the claims alleged in the complaint - reflect a traditional and strong resistance of Americans to any military instrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military. Those prohibitions are not directly presented by this case, but their philosophical underpinnings explain our traditional insistence on limitations on military operations in peacetime. Indeed, when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.
Laird v. Tatum, 40 LW. 4850 at 4854 (1972).

Justice Douglas in his dissenting opinion

pointed out:

The action in turning "armies" loose on surveillance of civilians was a gross repudiation of our traditions. The military, though important to us, is subservient and restricted purely to military missions. " Id. 4856.

Military missions do not include the investigation of suspected violators of federal firearms laws. For as the founding fathers realized in a free country the military protects citizens from attachs from without. A society which uses its military to protect it from itself is a society devoid of liberty.

IV. Evidence obtained in violation of the Federal Constitution must be suppressed.

The next question, of course, is notwithstanding the fact that the Constitution of the United States has been violated, notwithstanding the fact that proper procedures were not followed and notwithstanding the fact that the evidence was obtained as a result of all the previously mentioned facts, sould the evidence be suppressed?

the fifth and Fourteenth Amendments to the United States Constitution provide that no person shall be "deprived of life, liberty, or property without due process of law".

. It has been held that "the due process

clauses of both the Fifth and Fourteenth Amendments are directed at the protection of the individual, and he is entitled to their immunity as much as against the state as against the national government," Curry v. McCanless, 307 U.S. 357, 59 S.Ct. 900, 83 L.Ed. 1339.

The due process clause in Common Law countries dated back to the signing of the Magna Charta. In 1215, the nobles of England forced King John to concede that even the kind must obey the law and follow established procefures before he could deprice a subject of life, liberty or property. "The phrase 'due process of law' is an equivalent of the phrase 'law of the land' in Magna Charta. " Davidson v. New Orleans, 96 U.S. 97, 24 L.Ed. 616; Twining v. New Jersey, 211 U.S. 78, 29 S. Ct. 14, 53 L. Ed. 93.

"The words 'law of the land' as used

in Magna Charta implied a conformity with the ancient and customary laws of the English people, or laws enacted by Parliament. "Davidson v. New Orelans, 96 U.S. 97, 24 L.Ed 616.

> The Magna Charta provision that 'no man ought to be taken or imprisoned, or deprived of his life, liberty, or property, but by the judgment of his peers, or by thelaw of the land' . . . was intended to secure the individual from arbitrary exercise of the powers of the government, unrestrained by the established principles or private rights and distributive justice. Bank of Columbia v. Okely, 4 Wheat 235.

How can an individual be secure from "the arbitrary exercise of the powers of the government" if investigators in the United States Treasury Department and Members of the Marine corps can conspire to violate the laws of the land and are then rewarded by the courts for such violations? Surely, defendants' conviction must be interpreted as a reward, for while the Constitution and the laws have been ignored and a basic foundation of freedom is lost,

the conspiracy has achieved its stated objective which was to secure convictions of the defendants.

If the police can violate the United States Constitution, can violate the laws of the United States, can solicit violations of the United States Constitution, can solicit active duty soldiers to violate military law and the military can violate the Constitution and laws of the United States as well as their own regulations and are both encouraged to do so by courts which permit the fruits of this unfortunate harvest to serve as the basis for conviction, then where is respect of law and observance of due process to be found? There is only one way to insure respect for law and that is for the Courts to insist that those charged with enforcing the law set the best of examples. For the Courts to do less, would place the Courts in a position of condemning the

individual for breaking the law, yet on the other hand encouraging the police to do so. The hypocracy of such a position is obvious. The only way that Courts can insist that those charged with enforcing the law are not encouraged to violate it under these circumstances is to suppress the illegally obtained evidence.

As the Supreme Court of the United States has stated, "A conviction resting on evidence secured through a flagrant disregard of the procedures which Congress has commanded cannot be allowed to stand without making the Courts themselves accomplices in willful disobediance of law." McNabb v. United States, 318 U.S. 332, 345; Elkins v. United States, 364 U.S. 206, 223.

The United States Supreme Court has stated time and again that illegally and unconstitutionally obtained evidence may not be permitted to undermine our system of justice. In Mapp v. Ohio, 367 U.S. 643, 81

S.Ct. 1684, 6 L.Ed. 2d 1081 (1961), it stated:

> The criminal goes free if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse its disregard of the character of its own existence. Mapp, at 659.

In Elkins v. United States, 364 U.S. 206, the Silver Platter Doctrine was declared invalid:

> Yet when a federal court sitting in an exclusionary state that admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Federal Constitution. Elkins, at 208.

As Luther Martin of Maryland stated at the Constitutional Convention ". . . when a government wishes to deprive its citizens of freedom and reduce them to slavery, it generally makes use of a standing army." Laird v. Tatum, 40 L.W. 4850, 4855 (1972).

In the SEnate debates over the bill

which was to become 18 USC § 1385,

Senator Merrimon of North Carolina stated:

> The Army is the reserved power of the nation to be used only in the last extremity. The army of the nation cannot be employed for ordinary purposes. The truth is that whenever this is done, if this doctrine is to prevail in this country, it will be a long way in the march toward absolute despotism.
>
> Mr. Kirkwood: If the army helps in enforcing the law, it is despotism!
>
> Mr. Merrimon: Oh, no; it is not enforcing the law, it is subverting the law.
>
> 7 Cong. Rec. 4244.

It does indeed subvert the law. For to permit the evidence obtained as a result of this illegal operation would be to declare that the Constitution of the United States no longer governs the land and that the military is no longer governed by Congress. It was the boast of the founding fathers that the United States, unlike most countries on the earth is a free country, governed by the will of those who inhabit it, that the military

force was not established to enforce the laws, was not established to force the population into submission, was not established to serve as the armed force of the country subject only to the whim of the local sheriff. No, the Armed Forces of the United States was established to repel invasion.

It is clear that this type of activity, if permitted to continue, would encourage unchecked military activity heretofore forbidden by the laws of the land, would remove an important safeguard which has kept this country free from executive and military tyranny for almost 200 years, and would open the door to a mobile national police force at the disposal and discretion of any law enforcement official. For while the police and the marines may claim that they were only trying to put an end to the firearms violations, Justice Brandeis warned us long ago, "That experience should teach

us to be most on our guard to protect liberty when the government's purposes are beneficient. Men born to freedom are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest dangers to liberty lerk in invideous encroachment by men of zeal, well meaning but without understanding." Olmstead v. United States, 277 U.S. 438.

The paths open to Special Investigators, Clowser and Windsor, were many; they could have used other Special Investigators or civilians. However, in their zeal they did not explore those alternative but simply turned to what was for them expedient but what was for the Republic most perilous. Such action cannot be tolerated; for a nation which permits subversion of its laws, its Constitution, its traditions, its principles and its spirit will find greatness an experience of the past.

Respectfully
Submitted,

FRANK B. TAVENNER